JOSEPHINE COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-208 Decided October 30, 1989

Appeal from a decision of Administrative Law Judge David Torbett upholding Notice of Violation No. 79-1-47-54, Cessation Order No. 79-1-47-6, and a civil penalty assessment of $ 22,500 for failure to eliminate a new highwall. CH 0-52-R, NX 5-18-P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

   Where the evidence establishes that operations under the initial regulatory program adversely affected a pre-existing highwall by cutting into the highwall, appellant has "used or disturbed" the highwall and was required, under the interim regulations, to eliminate the orphan highwall.

2. Rules of Practice: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

   In order to dismiss a proceeding on the basis of undue delay, the moving party must show that the delay directly and adversely affected its ability to present its evidence on a controlling factual or legal issue.

3. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

   Under the applicable permanent program regulation, 30 CFR 816.106(b), a pre-existing highwall must be

completely eliminated unless there is insufficient reasonably available spoil to completely backfill the area. All spoil within the permit which is accessible and available for use is, by definition, reasonably available spoil.

4. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

Compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance requirements.

APPEARANCES: Lewey K. Lee, Esq., Wise, Virginia, for appellant; R. Anthony Welch, Esq., Office of Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Josephine Coal Company (JCC) has appealed from a decision of Administrative Law Judge David Torbett, dated November 25, 1986, upholding Notice of Violation (NOV) No. 79-1-47-54, and Cessation Order (CO) No. 79-1-47-6, issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) for failure to eliminate a new highwall, and assessing a civil penalty in the amount of $ 22,500 for failure to abate the violation by December 14, 1979.

The factual background in which this appeal arises was set forth in Judge Torbett's decision:

The subject mine site is located in Wise County, Virginia. An orphaned highwall existed at this mine site prior to May 3, 1978 - the effective date of the Act. This pre-existing highwall was 110 feet in height (Exs. P-10, P-11, P-12).

The Applicant obtained a small operator exemption on April 28, 1978, and began mining coal at the subject mine site shortly thereafter. The Applicant's exemption was effective until January 1, 1979 (Ex. P-3). As a consequence, the Applicant submitted an interim permit application to the Virginia Division of Mined Land Reclamation sometime before the expiration of its small operator exemption (Ex. R-4). The record does not reveal when the Applicant actually received its interim program permit; but, it is clear that the Applicant mined for sometime without a mining permit (Ex. P-9).

According to the Applicant's general mining plan, the Applicant planned to take a 700-foot cut. Such a cut would have produced enough spoil to eliminate all newly created highwalls in accordance with the applicable Federal regulations. In particular, the Applicant intended to eliminate and restore any

> remaining highwalls to their approximate original contour (Ex. R-4). 30 C.F.R. § 715.14(b) (1986). However, after taking a 200-foot cut at the subject mine site, the Applicant discovered that the coal had already been both deep-mined and augured (Ex. P-9) (Tr. 101, 121). The Applicant had no prior knowledge of these previous mining activities, because there were no mining maps or records (Ex. P-9).
>
> This lack of coal made further mining impracticable. The Applicant consequently stopped its mining operations without producing the amount of spoil necessary for complete highwall elimination. The Applicant then spread the spoil that it had created across the mine site, leaving an unreclaimed highwall - which is the reason for this controversy (Exs. R-1, R-2, P-8, P-9, P-10. P-15).
>
> On September 14, 1979, the Applicant submitted a request for amendment to the Virginia Division of Mined Land Reclamation. The amendment request was for revising the Applicant's general mining plan so that it would conform with the Applicant's actual mining activities at the subject mine site (Exs. R-6. R-4). However, the Virginia regulatory authority did not approve the Applicant's request for amendment, apparently because the Applicant did not provide the State enough information. Therefore, on December 19, 1979, the Applicant submitted another request which included more information. The State granted this second request on January 10, 1980 (Ex. R-7).
>
> Meanwhile, during this amendment process, OSM Inspector David Beam made an investigation of the subject mine site on October 31, 1979. He discovered that the Applicant's mining operation created a new highwall, which was only partially reclaimed and which, in his opinion, violated 30 C.F.R. § 715.14(b)(1)(ii). Inspector Beam consequently cited the Applicant with NOV No. 79-1-47-54. This notice of violation required Applicant to eliminate this highwall to the least slope possible before December 14, 1979 (Ex. R-1). However, when Inspector Beam conducted a follow up inspection on December 14, 1979, he found that no remedial action had been taken. As a consequence, Inspector Beam issued CO No. 79-1-47-6 to the Applicant (Ex. R-2). [Footnotes omitted.]

(Decision at 2-3).

As Judge Torbett had noted earlier in his decision, appellant duly filed an application for review of the NOV, including a request for temporary relief. A hearing on the request for temporary relief was then scheduled for December 13, 1979. This hearing was subsequently postponed, however, at the request of appellant, so that the assessment conference could be held and the hearing on the NOV and the CO could be combined. For reasons which were never adequately explained, the assessment conference was not held until December 20, 1984. A civil penalty of $ 22,500 was assessed against appellant, who thereupon petitioned for formal review of

the proposed civil penalty. The cases were duly consolidated and a hearing was held on December 19, 1985.

In his decision, Judge Torbett affirmed OSMRE's issuance of the NOV, CO, and imposition of civil penalties finding, inter alia, that JCC's mining operations were subject to the Federal interim regulatory program, 30 CFR Subchapter B, 1/ since JCC's mining operations had actually cut at least 200 feet into the orphan highwall. Thus, he concluded that, unlike the situation in Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979), where the Interior Board of Surface Mining and Reclamation Appeals held that the operator had incurred no obligation to remove the orphan highwall because the operation had not "adversely affected" and, thus, had not "used or disturbed" the pre-existing highwall, in this case the operator had "disturbed the orphaned highwall in a substantial manner" (Decision at 4). Judge Torbett concluded, citing Mountain Enterprises Coal Co., 3 IBSMA 338, 88 I.D. 861 (1981), that appellant was, therefore, required to eliminate the highwall.

Judge Torbett recognized that, under 30 CFR 715.14(b)(1), the regulatory authority could modify the general requirement that the operator return the land mined to the approximate original contour (AOC) where the mining reaffected previously mined lands and sufficient spoil was not available to return the land to AOC. Judge Torbett noted, however, that even this modification would still require the elimination of the highwall, which had not occurred. Moreover, while the State regulatory authority had approved the modification, the Judge held that, to the extent that the State action failed to require elimination of the highwall, it failed to meet the minimum standards of the initial Federal program.

Appellant had also argued that since it would not be required to eliminate the highwall under Virginia's permanent program regulations, failure to eliminate the highwall under the interim regulations did not result in a lack of compliance with the applicable standards. 2/ Judge Torbett rejected this argument, noting that the actions involved took place under the interim program and that appellant never obtained a permit under the Virginia permanent regulatory program.

Judge Torbett similarly rejected appellant's argument that OSMRE was estopped from enforcing total highwall elimination because it had approved

---

1/ Under 30 CFR 710.11(d), the initial regulatory program applied "to operations conducted after the effective date of these regulations on lands from which the coal has not yet been removed and to any other lands used, disturbed, or redisturbed in connection with or to facilitate mining or to comply with the requirements of the Act or these regulations."

2/ Thus, appellant noted that under 30 CFR 816.106, which sets minimum Federal standards for state permanent regulatory programs, orphan highwalls could be re-mined without requiring complete highwall elimination in certain circumstances.

the Commonwealth of Virginia's policy which only required that highwalls be eliminated to the maximum extent possible, noting that there was no evidence that OSMRE had ever assented to this policy and that, even if it had, such an agreement would be invalid, citing River Processing, Inc. v. OSMRE, 76 IBLA 129, 137 (1983) (Decision at 6). Judge Torbett also found that the fact that the Commonwealth of Virginia had released appellant's reclamation bond did not give rise to a claim of estoppel or res judicata (Decision at 7).

Finally, Judge Torbett rejected appellant's argument that the case should be dismissed because appellant had been prejudiced by the 4 years' administrative delay which had occurred between issuance of the CO and the holding of the penalty assessment conference. While recognizing that during this period Kyle Strouth, the principal mine operator, had died, Judge Torbett concluded that no testimony which he might have offered could have overcome the documents and maps which clearly established the fact that appellant had disturbed the pre-existing highwall (Decision at 6). Accordingly, Judge Torbett sustained the NOV and the CO, noting that there was no dispute that the highwall had not been eliminated as required. He further upheld the civil penalty assessment of $ 22,500, as the minimum assessment possible under 30 CFR 723.15(b).

[1] Before the Board, appellant essentially reiterates the arguments which it pressed below. Thus, appellant argues that "there is no evidence whatsoever in the transcript that there was any adverse effect to the pre-existing highwall" (Statement of Reasons (SOR) at 5-6). This is simply not true. Clarence Strouth, a partner in JCC, affirmatively testified as follows:

> Q. [By Mr. Welch] The pre-existing highwall that was there when you started mining, did you see it?
>
> A. Yes.
>
> Q. Did you cut into it?
>
> A. We cut down on it, but we didn't cut into it. It was all ready faced up. You know, I explained that to you. We took the Blair out, went up on top of the Clintwood, pulled it down to the coal that was left.
>
> Q. So you went to the top of the highwall on the Clintwood and cut down on the Clintwood? So, you did cut into the wall you just came from the top?
>
> A. Yeah, we come from the top down. When we got to the bottom, that's when we found out we didn't have any coal left.

(Tr. 129-30). Moreover, this testimony is completely corroborated by a series of mine maps submitted by appellant at the hearing. See Exhs. P-10

through P-15. There is, in short, no question that appellant disturbed the pre-existing highwall. 3/

[2] Appellant repeats its assertion that the long delay in ultimate adjudication caused by the 4-year postponement in holding the assessment conference prejudiced its case, particularly in that Kyle Strouth, the principal operator of the mine, died in the intervening period and, thus, was unable to testify as to his on-the-ground activities. Judge Torbett concluded that appellant was not prejudiced by the delay and our independent review of the record fully supports his conclusion.

While we recognize that circumstances may occur wherein the failure of the Government to timely proceed with the administrative process may so inhibit a party from adequately presenting its case that justice requires dismissal of the proceedings, such is not the situation herein. The sole matter of factual dispute is whether or not appellant disturbed the orphan highwall. 4/ We have noted above that the conclusion that it did so is inescapable. Nothing that Kyle Strouth might have testified to could have altered this conclusion. Indeed, Judge Torbett expressly so found. Thus, the inordinate delay which did occur, while regrettable, did not prejudice appellant's ability to present its case.

[3] Appellant's main argument, however, deserves closer scrutiny. Appellant, in essence, contends that under the permanent program regulations, specifically 30 CFR 816.106, its actions would have been totally in accord with the provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982). Appellant argues that

> since the Virginia permanent program does permit less than total elimination of pre-existing highwalls, it is Petitioner's contention that since the Virginia authorities did permit the action and their permanent program regs now allow it, that this action on the NOV and CO by federal authorities should be dismissed.

(SOR at 3). Judge Torbett rejected this argument on the ground that appellant's actions occurred under the interim program and, in fact, appellant never received a permanent program permit. As we shall show, however, this argument is flawed for a more fundamental reason.

3/ Appellant's assertion that the evidence merely shows that a cut was taken downward on a bench in front of the highwall is not merely implausible, it is impossible. As the maps clearly show, the Clintwood is above the bench area. Thus, when Strouth testified that they came down to the Clintwood, they necessarily cut into the highwall. See, e.g., Exhs. P-12 and P-15.

4/ While there is also a dispute as to whether or not OSMRE approved the Virginia policy of allowing less than full highwall removal, Kyle Strouth's testimony could not have been probative of this issue.

The permanent program regulation in question, 30 CFR 816.106(b), provides, in relevant part, that:

> The requirements of § 816.102(a)(1) and (2) requiring the elimination of highwalls shall not apply to re-mining operations where the volume of all reasonably available spoil is demonstrated in writing to the regulatory authority to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:
>
> (1) All spoil generated by the re-mining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the re-mining operation shall be included within the permit area.

In repromulgating 30 CFR 816.106(b) (1986), 5/ the Department recognized that it represented a significant departure from the interim regulations which required total elimination of the highwall in all cases. See 51 FR 41734 (Nov. 18, 1986). In discussing the scope of this regulation, OSMRE noted:

> The board decisions in Cedar Coal Co. [supra,] and Miami Springs Properties [2 IBSMA 399, 87 I.D. 645 (1980)] interpret the interim program regulation on Backfilling and grading at 30 CFR 715.14, which in paragraph (b)(1)(ii) requires the complete elimination of a reaffected pre-existing highwall. Both decisions interpret the highwall elimination requirement of section 715.14 as conditioned upon whether disturbance of a highwall causes an adverse physical impact.
>
> Unlike section 715.14, the corresponding permanent program regulations at 30 CFR 816.102 and 817.102 authorize less than

5/ While the present 30 CFR 816.106(b) was repromulgated in 1986 (see 51 FR 41734 (Nov. 18, 1986)), it was originally promulgated in 1983 as 30 CFR 816.106(a). See 48 FR 41720 (Sept. 16, 1983). As adopted in 1983, 30 CFR 816.106(b) provided that the requirement that highwalls be eliminated would not apply to re-mining operations that did not have an adverse physical impact on the pre-existing highwall. This latter provision had the effect of exempting such operations regardless of the presence of sufficient spoil to eliminate the highwall. This regulation was challenged before Judge Flannery in Round III of In re Permanent Surface Mining Litigation II, Civ. No. 79-1144 (D.D.C. 1984). Pursuant to an agreement of the parties, however, 30 CFR 816.106(b) (1983) was suspended before entry of a judgment and was, thus, not considered by Judge Flannery. See 50 FR 257 (Jan. 3, 1985). On Nov. 18, 1986, 30 CFR 816.106(b) (1983) was permanently removed, and 30 CFR 816.106(a) (1983) was redesignated as 30 CFR 816.106(b).

> complete elimination of a pre-existing highwall in accordance with section 816.106 and 817.106, respectively. In appropriate circumstances, redesignated paragraphs (b) of these sections require an operator to eliminate a pre-existing highwall only to the maximum extent technically practical. Thus, the requirements of the permanent program for reclamation of a pre-existing highwall are significantly more flexible than those of the interim program. [Emphasis in original.]

51 FR 41735 (Nov. 18, 1986).

In apparent anticipation of the adoption of what ultimately became 30 CFR 816.106(b) (1986), the Commonwealth of Virginia had submitted a regulation, V816.106(b), which provided that the requirement of highwall elimination would not apply on re-mined areas "where the volume of all reasonably available spoil is demonstrated in writing to the Division to be insufficient to completely backfill the reaffected or enlarged highwall." It further provided that "[a]ll spoil generated by the re-mining operation and any other reasonably available spoil shall be used to backfill the area." V816.106(b)(1).

Approval of this regulation was contested in Virginia Citizens for Better Reclamation, Inc. v. Watt, 19 ERC 1382 (E.D. Va. 1983). 6/ The court rejected a challenge to the regulation as contravening an absolute directive that highwalls be removed, concluding that:

> [R]equiring operators to fully eliminate highwalls not of their making on previously mined land would be so burdensome as to work against re-mining and, hence, reclamation of this land. Acceptance of Virginia's rule is consistent with the express policy

---

6/ Counsel for OSMRE challenged appellant's assertion that the decision in Virginia Citizens for Better Reclamation v. Watt, supra, discussed this matter. Thus, counsel noted that "[a]ppellant argues, without cite, the unpublished decision in Virginia Citizens for Better Reclamation v. Watt, (4th Cir. No. 83-1828 1984) as a defense. That decision, attached, bears no relationship to this matter" (Answer at 5 n.1). In point of fact, appellant was referring to the District Court's decision in that case. While the provisions of V816.106(b) were not discussed in the Circuit Court decision, they were analyzed by the District Court. The confusion of counsel for OSMRE was clearly engendered by the unjustified failure of appellant to provide any citation for its assertions. Neither opposing counsel nor this Board should be expected to track down cases on which a party seeks to rely. If a party believes that a Federal court decision is of relevance, it seems elementary that the party should provide a correct citation thereto or supply a copy of the decision with its pleading.

> of the Act, see 30 U.S.C. §§ 1201(h) and 1202(h). It does not contravene the general intent of the Act, notwithstanding § 1265(b)(3) requiring complete elimination of highwalls. The Court concludes, with the Secretary, that the Act simply does not deal with this special situation. [Citations omitted.]

Id. at 1392.

Appellant contends that, under this regulation, its failure to eliminate the highwall was justifiable. This is not the case. While the evidence is uncontradicted that the operations which appellant conducted on the highwall generated insufficient spoil to allow for complete highwall elimination, the statutory exemption applies only where there is insufficient "reasonably available spoil" to permit highwall elimination.

The phrase "reasonably available spoil" is defined in the Virginia permanent program as "spoil and suitable coal mine waste material generated by the remining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and available for use * * *." V700.5 (emphasis supplied). There is uncontradicted evidence in the record that sufficient spoil existed within the permit area to allow for the complete elimination of the highwall (Tr. 17-18, 20). 7/ Thus, even if the instant case had arisen under the permanent program, the NOV and CO would be properly sustained.

[4] Finally, appellant contends that OSMRE is barred from prosecuting this enforcement action because Virginia achieved primacy in 1981 and Virginia authorities had supervised the reclamation of the mine site both prior to primacy and since 1981. Appellant argues that Virginia has determined that appellant's mining operation has been properly reclaimed as evidenced by the final inspection order and bond release (SOR at 4).

We disagree. The law is well settled that compliance with a state permit containing less stringent standards does not excuse appellant from complying with the interim program standards. See Mountain Enterprises Coal Co., supra; Tollage Creek Elkhorn Mining Co., 87 I.D. 570, 575 (1980); Cedar Coal Co., supra at 255. In any event, as discussed above, appellant also failed to comply with the relevant Virginia State permanent program standards.

7/ Moreover, the testimony of Lowell Marshall, presented on behalf of appellant, to the effect that its operation would be in compliance with the Commonwealth of Virginia permanent program regulations was clearly in error, as he expressly testified that reasonably available spoil was only "material generated from the cut" (Tr. 37). This is not the applicable standard under the Virginia program. See discussion supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

David L. Hughes
Administrative Judge